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BEFORE THE
FEDERAL MARITIME COMMISSION

ODYSSEA STEVEDORING OF PUERTO RICO, INC., **Complainant,**	:
v.	:
PUERTO RICO PORTS AUTHORITY **Respondent;**	:
* * * * * *	:
INTERNATIONAL SHIPPING AGENCY, INC., **Complainant,**	:
v.	: **Docket Nos. 02-08; 04-01; and 04-06**
PUERTO RICO PORTS AUTHORITY **Respondent;**	:
* * * * * *	:
SAN ANTONIO MARITIME CORPORATION **Complainant,**	:
v.	:
PUERTO RICO PORTS AUTHORITY **Respondent.**	:
* * * * * * * * * * * *	:

COMMONWEALTH OF PUERTO RICO'S BRIEF ON ITS ENTITLEMENT TO SOVEREING IMMUNITY FROM THE ADJUDICATION OF PRIVATELY-FILED COMPLAINTS ALLEGING VIOLATIONS OF THE SHIPPING ACT

The Commonwealth of Puerto Rico, as an *amicus curiae*, hereby presents its position with regard to its entitlement to sovereign immunity from adjudication of privately-filed complaints alleging violations of the Shipping Act, pursuant to the November 22, 2004 Order of the Commission.

I. INTRODUCTION

The question presently before the Commission is whether Puerto Rico should be treated as a state for the purposes of constitutional sovereign immunity from federal administrative proceedings in light of the origin and purposes of such immunity as explained by the Supreme Court in *Alden v. Maine*, 527 U.S. 706 (1999), *Federal Maritime Commission v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).[1]

Unquestionably, the Commonwealth of Puerto Rico (the "Commonwealth" or "Puerto Rico") is a "State" for the purposes of sovereign immunity. Therefore, the Commission is barred from summoning the Commonwealth or its instrumentalities to answer the complaints of private parties.

Although the Commission poses the question of whether the Commonwealth is entitled to "constitutional" sovereign immunity, as discussed below, it is unnecessary to reach the constitutional question in the frame of the Puerto Rico Federal Relations Act ("PRFRA"), which established a "default rule" that "[s]tatutes of general application would apply equally to Puerto Rico and to the fifty state *unless* Congress made specific provision for differential treatment."

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[1] *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Order, FMC Docket No. 02-08 at 6, (Nov. 22, 2004)[hereinafter FMC Order].

Under PRFRA, the Commonwealth is entitled to sovereign immunity to the same extent as the States. The "default rule" and Presidential Directives have long required the FMC to apply the statutes of the United States to the Commonwealth to the same extent as to the States. Under the "default rule," Puerto Rico is entitled to the same treatment as the States unless Congress expressly provides differently for Puerto Rico. The Shipping Act contains neither the required specific language nor suggests a compelling reason to treat the Commonwealth differently. Accordingly, the Commission must recognize the sovereign immunity of the Commonwealth provided by statute and need not reach the constitutional question posed.

Nevertheless, if the Commission decides to address the constitutional issue, it should conclude that, for the purposes of sovereign immunity protection, the Commonwealth enjoys the same dignity as the States and, therefore, it is entitled to sovereign immunity. The government of the People of Puerto Rico has enjoyed sovereign immunity from its inception. In fact, since 1913, the Supreme Court consistently has recognized that Puerto Rico is a government sovereign, which enjoys immunity from suits without its consent. When in 1952, the United States and the People of Puerto Rico entered into a *compact* to define the nature of its political relationship, Puerto Rico did not renounce to such attribute. On the contrary, Puerto Rico retains its inviolate sovereign immunity from suit without its consent in local and federal proceedings, at minimum, to the same extent as the States.

II. STATEMENT OF THE CASE[2]

A. Nature of the Case

There are presently three separate privately-filed complaint proceedings before this Honorable Commission in which the Puerto Rico Ports Authority ("PRPA") is a respondent: *Odyssea Stevedoring of Puerto Rico v. PRPA*, No. 02-08 ("*Odyssea*"); *International Shipping Agency v. PRPA*, No. 04-01 ("Intership"); and, *San Antonio Maritime Corp. v. PRPA*, No. 04-06 ("SAM").

Sovereign immunity and the Eleventh Amendment to the United States Constitution apply to adjudications before the Federal Maritime Commission and bar the Commission from summoning States to answer the complaints of private parties. In these proceedings, PRPA claims that it is entitled to sovereign immunity as an "arm of the state". Therefore, the Commission is barred from adjudicating these privately-filed complaints.

B. Course of Proceedings

The parties to these proceedings submitted proposed procedural schedules to facilitate the Commission's determination whether PRPA is entitled to sovereign immunity.

While briefing the issue of whether PRPA is entitled to sovereign immunity, the parties to the three proceedings focused their arguments on whether PRPA is an "arm of the state."

As stated by this Commission in its November 22, 2004 Order, the parties provided adequate briefing on the issue of PRPA's status as an arm of the state.

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[2] Our statement of the case rests on the facts summarized by this Honorable Commission in its November 22, 2004 Order.

However, the Commission found they did not address what it characterized as a "threshold issue": Whether the Commonwealth of Puerto Rico should be treated like a state for the purposes of constitutional sovereign immunity from federal administrative proceedings.

The Commission noted that First Circuit has long held that Puerto Rico is to be treated like a state for sovereign immunity purposes, but the Supreme Court reserved judgment on the issue in *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993). The Commission also indicated that the federal district court for the District of Columbia recently held that Puerto Rico was not entitled to constitutional sovereign immunity. *Rodríguez v. Puerto Rico Federal Affairs Admin.*, 2004 WL 22225221 (D.D.C. 2004).[3]

Subsequently, the Commission required the parties to the above-captioned proceedings to file briefs addressing whether Puerto Rico should be treated as a state for the purposes of constitutional sovereign immunity from federal administrative proceedings, in light of the origin and purposes of such immunity as explained by the Supreme Court in *Alden v. Maine* and its progeny. While refusing to consolidate these proceedings at this time, the Commission authorized PRPA to submit a single brief for all three cases.

In light of the relevant issue addressed by this Honorable Commission in its November 22, 2004 Order, which involves matter of fundamental public policy with regard to the status of the Commonwealth of Puerto Rico as a party to

[3] The order denying sovereign immunity to the Puerto Rico Federal Affairs Administration has recently been certified for interlocutory appeal under 28 U.S.C. § 1292(b), after the District Court recognized substantial disagreement over the matter. *See* Order, *Rodríguez v. Puerto Rico Federal Affairs Admin.*, Docket Co. CIV.A.03-2246(JR)(Dec. 13, 2004).

proceedings in federal judicial and administrative proceedings, the subscribing party petitioned leave to file a brief as an *amicus curiae* in this matter.

Hereby, the Commonwealth of Puerto Rico presents its position with regard to its entitlement to sovereign immunity from adjudication of privately-filed complaints in federal administrative proceedings.

III. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

> Whether Puerto Rico should be treated as a state for the purposes of constitutional sovereign immunity from federal administrative proceedings in light of the origin and purposes of such immunity as explained by the Supreme Court in *Alden v. Maine, Federal Maritime Commission v. S.C. State Ports Auth.*, and other relevant opinions.

III. ARGUMENT

The Commonwealth of Puerto Rico is entitled to sovereign immunity as a matter of statutory and constitutional law. First, under the "default rule" established in the Puerto Rico Federal Relations Act ("PRFRA"), under which statutes of general application would apply equally to Puerto Rico and to the fifty state *unless* Congress made specific provision for differential treatment, the Commonwealth is entitled to sovereign immunity to the same extent as the States as a matter of statutory construction.

Also, in light of the origins and purposes of such immunity as explained by the Supreme Court in *Alden v. Maine* and other relevant opinions (emphasizing the fundamental aspect of sovereignty and the inherent dignity emanating from it) the Commission should conclude that the Commonwealth enjoys the same dignity as the States and, therefore, it is entitled to sovereign immunity.

However, considering the complex and delicate historical and political elements surrounding the issue under consideration, it is appropriate to present to this Honorable Commission an overview of the development and legal framework of the political and juridical relationship between the Commonwealth of Puerto Rico and the United States.

A. The Development of the Commonwealth of Puerto Rico

The political relationship between the Commonwealth of Puerto Rico and the United States dates back to 1899, when the Island was ceded to the government of the United States under the Treaty of Paris. Almost immediately after Puerto Rico was ceded to the United States, a civil government was established, which enjoyed sovereign immunity as a natural function of its governmental powers. In fact, since 1913, the Supreme Court has recognized that the government established in Puerto Rico is of such nature as to come within the general rule exempting a government sovereign in its attribute from being sued without its consent.[4] This sovereignty was reaffirmed and buttressed in the *compact* between the United States and the Commonwealth Constitution in 1952. The *compact* guaranteed the Commonwealth the same autonomy and independence as the States.[5]

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[4] *See People of Puerto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913)("The government which the organic act established in Porto Rico [sic] is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent"); *See also People of Porto Rico v. Emmanuel*, 35 S.Ct. 33, 36, 235 U.S. 251, 257, 59 L.Ed. 215, 215 (1914); *People of Porto Rico v. Ramos*, 232 U.S. 627, 34 S.Ct. 461, 58 L.Ed. 763(1914).

[5] For a detailed description of the various adjustment to Puerto Rican autonomy through congressional legislation since 1898, see *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N. A.*, 649 F.2d 36, 39-41 (1st Cir. 1981).

1. Puerto Rico's autonomy under the Spanish regime

In 1493, on his second trip, Christopher Columbus landed in Puerto Rico and claimed it for Spain. By the of the end of the 19th century, Puerto Rico had acquired its own personality, with its own culture and idiosyncrasy. In fact, Puerto Rico enjoyed a political and intellectual development strong enough to allow for the claim of self-government and autonomy for the island. Accordingly, in November 1897, the Spanish government enacted a decree titled the "Charter of Autonomy of 1897".[6] Through the Charter of Autonomy, Puerto Rico was conferred substantial autonomy in internal governance.

Under this regime, Puerto Ricans enjoyed the same rights with regard to nationality and citizenship as peninsular Spaniards.[7] Specifically, the Charter established a conjoint government by an insular parliament, consisting of two chambers, and the Governor-General.[8] The Insular Parliament consisted of two bodies known as "chamber of representatives" and "council of administration".[9]

The power vested in the Insular Parliament was broad. In fact, it had: (i) power to entertain in all matters not expressly reserved to the Spanish central government[10] and; (ii) exclusive cognizance of all matters of a purely local nature, as civil administration; territorial, provincial, municipal, or judicial apportionment; public health; and, public credit.[11] Similarly, the Charter recognized to the island, through delegates with voice and vote in the Spanish

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[6] Charter of Autonomy, 1987, I L.P.R.A. T.I *et seq.*

[7] *Id.*, Art. 63.
[8] *Id.*, Art. 2.
[9] *Id*, 4.
[10] *Id*, Art. 32.
[11] *Id.*

legislature, although not for the first time, a saying even in the Spanish national affairs.[12]

2. 1899 - Cession to the United States Under the Treaty of Paris

Following the Spanish-American war, under the Treaty of Paris, Spain ceded the island of Puerto Rico, among other possessions, to the United States.[13] The conditions for the cession were established in detailed in the Treaty of Paris. However, after the cession, Puerto Rico retained a residuary and inviolable sovereignty which has been recognized by the Supreme Court since 1913.

1. 1900—The Foraker Act, Puerto Rico's First Organic Act.

In 1900, Congress established a civil government in Puerto Rico under the Foraker Act.[14] To achieve this end, Congress extended "the protection of the United States" to the inhabitants of Puerto Rico, who were deemed to be "citizens of P[ue]rto Rico."[15] The Foraker Act recognized that the inhabitants of Puerto Rico "constitute[d] [a] body politic under the name of The People of P[ue]rto Rico."[16] This "body politic" possessed all of the fundamental

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[12] *Id.* Art. 40.
[13] Article III of the Treaty of Paris provided, "Spain cedes to the United States the island of Porto Rico [sic] and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones." 30 Stat. 1754 (1899).
[14] Act of April 12, 1900, c. 191. 31 Stat. 77 (1900).
[15] *Id.* § 7.
[16] *Id.*

characteristics of a government including the power to be sued only by its consent.[17]

Although the Federal government retained some control over the new government of Puerto Rico, Congress yielded to the principles of self-government by providing for direct election of the House of Delegates by the People of Puerto Rico.[18] Under this design, the federal government established a dual method of control over the internal workings of the government of Puerto Rico, but recognized that the People of Puerto Rico were a body politic unto themselves.[19]

In 1913, in the case of *Puerto Rico v. Rosaly Castillo, supra,* the Supreme Court had the opportunity to adjudicate the controversy presently before the Commission: whether Puerto Rico possesses immunity from suit without its consent. The Court held that the government that the organic act established in Puerto Rico was of such nature as to come within the general rule exempting a "government sovereign" in its attributes from being sued without its consent. The Court reaffirmed its position that the purpose of the Foraker Act was to give local self-government conferring **an autonomy similar to that of the states**.[20]

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[17] For an analysis of the history and evolution of the Puerto Rico's sovereign immunity doctrine against suits in local courts, see *Defendini v. Commonweath of Puerto Rico,* 1993 JTS 119, 134 D.P.R. 28, (1993); 1993 P.R.Eng. 839857.
[18] 31 Stat. 77, *supra.*
[19] *See People of Puerto Rico v. Rosaly y Castillo,* 227 U.S. 270, 273 (1913).
[20] *Id.; See also Gromer v. Standard Dredging Co.*, 224 U. S. 362, 56 L. ed. 801, 32 Sup. Ct. Rep. 499 (1912).

2. 1917—The Jones Act, Puerto Rico's Second Organic Act.

Consistent with the Supreme Court's recognition of the sovereignty of Puerto Rico, Congress restructured the government of Puerto Rico and reaffirmed congressional recognition of Puerto Rico's sovereignty in the Jones Act.[21] While Congress retained some control over local matters, it divested itself of control of Puerto Rico's legislative bodies.[22] The Executive Counsel's legislative role was eliminated and it became, essentially, the Governor's cabinet.[23] As a result, the legislative branch remained a two-house system, but both houses were directly elected by the People of Puerto Rico.[24] The legislative grant of authority "extend[ed] to all matters of legislative character not locally inapplicable."[25] After the Jones Act, the People of Puerto Rico had direct control of one of three branches of their government. Importantly, Congress did not retreat from the Supreme Court's expression of Puerto Rico's sovereignty.

3. 1947—The Elective Governor Act, Control over the Executive.

Rather, Congress consistently proceeded toward local autonomy through the Elective Governor Act. It amended section 12 of the Jones Act to provide for a general popular election, starting in 1948, for the position of Governor of Puerto

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[21] Act of March 2, 1917, c. 145. 39 Stat. 951 (1917).
[22] The Governor remained under the control of the President. *See id.* § 12 (Governor appointed by the President with advice and consent of the Senate, but "hold[ing] office at the pleasure of the President"). Despite the complete delegation of local legislative authority to the People of Puerto Rico, Congress expressly "reserve[d] the power and authority to annul" laws enacted by the Legislature of Puerto Rico. *Id.* § 34.
[23] *See id.* §§ 26, 13.
[24] *See id.* §§ 25 (Senate), 26 (House of Representatives).
[25] *Id.* § 37 (noting that any modification to existing laws must "be consistent with the provisions of th[e] [Jones] Act").

Rico.[26] In addition, all members of the Executive Counsel were to be appointed by the Governor.[27] By this Act, Congress vested in the People of Puerto Rico full control over the executive branch of their government resulting in popular control of two of three branches of the government of Puerto Rico.

4. Public Law 600, The Birth of the Commonwealth of Puerto Rico.

On July 3, 1950, as part of a continuing effort to promote autonomous rule in Puerto Rico and recognizing the principle of "government by consent", Congress passed Public Law 600, also known as the Puerto Rico Federal Relations Act (PRFRA). The legislation expressly declared its intention of permitting the people of Puerto Rico to "organize a local government pursuant to a constitution of their own adoption." 48 U.S.C. § 731(b). The Federal Relations Act authorized the Puerto Rico legislature to call a constitutional convention and to draft a constitution for submission to the President of the United States and ratification by the United States Congress. 48 U.S.C. § 731(d).

Public Law 600 expressly recognized that Congress had recognized the right of self government of the people of Puerto Rico and that a large measure of self-government had been achieved. However, in recognition of the wishes of the People of Puerto Rico to develop a governmental system that conforms to its

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[26] Act of August 5, 1947, c. 490, § 1. 61 Stat. 770 (1947). The Governor's term was set at four years, *id.*, and the Governor was made answerable to the People of Puerto Rico by subjecting him to the possibility of removal by impeachment from the House of Representatives. *Id.* § 2.
[27] *Id.* § 3.

idiosyncrasy, Congress enabled the People of Puerto Rico to establish a Constitution of their own.[28]

The very manner in which the *compact* was entered, through offer and acceptance, shows that Congress once again acknowledged the sovereignty of Puerto Rico articulated by the Supreme Court as early as 1913.[29] Ultimately, the Commonwealth Constitution became effective, not merely by an Act of Congress, but by the joint actions of the People of Puerto Rico and the United States Congress.

Public Law 600 specifically declared that, "fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."[30] After its enactment, in accord with its own terms, Public Law 600 was submitted to the voters of Puerto Rico for acceptance or rejection in a popular election.[31] According to Public Law 600, if a majority of the voters accepted the Federal government's offer, the Puerto Rico Legislature would call a constitutional convention to draft a Constitution.[32] The sole substantive requirement for the new Constitution was that it "shall provide a republican form of government and shall include a bill of rights."[33]

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[28] Act of July 3, 1950, c. 446. 64 Stat. 319 (1950).
[29] *People of Puerto Rico v. Rosaly y Castillo, supra.*
[30] *Id.* § 1.
[31] *Id.* § 2.
[32] *Id.* Upon adoption of the Constitution by the People of Puerto Rico, the Constitution was then to be presented to the President to ensure that it met with the established criteria. *Id.* § 3. The President would then transmit the Constitution to Congress for approval, at which time the Constitution would "become effective in accordance with its own terms." *Id.*
[33] *Id.* § 2.

On June 4, 1951, an overwhelming majority of voters in Puerto Rico accepted the offer to enjoy a Constitution of their own. As a result, in February 1952, the constitutional convention produced a proposed Constitution for Puerto Rico, which was to be submitted for approval by the People of Puerto Rico.

The Constitutional Convention named the new political order as the "Commonwealth of Puerto Rico." They explained their decision as follows:

> "[T]he word "commonwealth" in contemporary English usage means a politically organized community, that is to say, a state (using the word in the generic sense) in which political power resides ultimately in the people, hence a free state, but one which is at the same time linked to a broader political system in a federal or by other type of association and therefore does not have an independent and separate existence.
> [T]he single word "commonwealth", as currently used, clearly defines the status of the body politic created under the terms of the compact existing between the people of Puerto Rico and the United States, i.e., that of a state which is free of superior authority in the management of its own local affairs but which is linked to the United States of America and hence is part of its political system in a manner compatible with its federal structure."[34]

On March 3, 1952, the Constitution was approved by Puerto Rico's voters, again by an overwhelming majority of the popular vote.[35] After the President declared that the Constitution conformed with the requirements set forth in Public Law 600, it was sent to Congress for consideration. Congress noted the overwhelming support for the Constitution in Puerto Rico and that it was "adopted by the people of Puerto Rico."[36] Congress granted conditional approval of the

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[34] Res. No. 22 of the Constitutional Convention: To determine in Spanish and in English the name of the body politic created by the Constitution of the People of Puerto Rico, 1 L.P.R.A. Res. 22, 2/4/52.

[35] Such procedure conveys the essential ingredients of a compact, which was still more solemn in this case than in the case of compacts between states, inasmuch as Law 600 spells out a compact through the consent, not merely of a political organ of one of the contracting powers, but an entire people directly, by the human beings which constitute the community of Puerto Rico.

[36] J. Res. of July 3, 1952, c. 567. 66 Stat. 327.

Commonwealth Constitution without reserving for itself any rights to amend or veto future amendments, adding only the following language to Article VII:

> Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, **with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact**.[37]

The Constitutional Convention of Puerto Rico considered the changes suggested by Congress, and approved the Commonwealth Constitution.[38] As a result, on July 25, 1952, the Governor of Puerto Rico announced the establishment of the Commonwealth of Puerto Rico. At that time, the Constitution of Puerto Rico came into effect by, and in accordance with, its own terms.[39]

The Commonwealth Constitution provided, in its preamble, that it was established by the People of Puerto Rico "for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America."[40] The Constitution also declared that "political power [of the Commonwealth of Puerto Rico] emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon

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[37] *Id.*

[38] Res. No. 34 of Constitutional Convention: To accept, in behalf of the People of Puerto Rico, the conditions of approval of the Constitution of the Commonwealth of Puerto Rico proposed by the Eighty-Second Congress of the United States through Public Law 447 approved July 3, 1952, 1 L.P.R.A. Res. 34, 7/10/52.

[39] Upon the adoption of the Commonwealth Constitution, the existing Federal laws relating to Puerto Rico's local governance were repealed and the remaining Jones Act and Foraker Act provisions, which related to Puerto Rico's economic relationship to the United States, the application of Federal laws, and representation in Washington, were codified as the Puerto Rican Federal Relations Act. *See* J. Res. of July 3, 1952, c. 567. 66 Stat. 327.

[40] PR Const., Preamble.

between the people of Puerto Rico and the United States of America."[41] By this *compact*, Congress divested itself of any authority to control over the local governance of Puerto Rico. The People of Puerto Rico exercised complete dominion over their government—within the terms of the *compact*. Thus, Puerto Rico enjoys the total substance of self government and there is a plentitude of government by consent.

Having presented a detailed overview of the political and legal development of the relationship between the Commonwealth of Puerto Rico and the United States, we will address the question presently before the Commission: whether the Commonwealth of Puerto Rico should be treated as a state for the purposes of constitutional sovereign immunity from federal administrative proceedings.

IV. THE COMMISSION NEED NOT ADDRESS THE CONSTITUTIONAL SOVEREIGN IMMUNITY OF PUERTO RICO BECAUSE STATUTE ACCORDS THE COMMONWEALTH SOVEREIGN IMMUNITY.

Although the Commission poses the question of whether the Commonwealth is entitled to "constitutional" sovereign immunity, in light of the "default rule" established in the Puerto Rico Federal Relations Act, it is unnecessary to reach the constitutional question.

Where a dispute between parties may be resolved without addressing an underlying constitutional issue, the law favors avoiding the unnecessary

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[41] *Id.* art. 1, §1.

constitutional issue.[42] The Supreme Court's doctrine of avoidance of unnecessary constitutional adjudication is well-established:

> As we have explained: If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable. It has long been the Court's considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied . . . . It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.[43]

When pressed to consider constitutional issues, an adjudicative body must decide, before addressing the merits of a constitutional issue, whether the dispute between the parties may be resolved without speaking to the constitutional question.[44] This policy of avoidance of unnecessary constitutional interpretation also applies to the review of administrative adjudication.[45]

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[42] *See Elk Grove Unified School District v. Newdow*, -- U.S. --, 124 S. Ct. 2301, 2308 (2004) ("Even in cases concededly within our jurisdiction under Article III, we abide by 'a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision.'") (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)) (alterations in original).

[43] *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (internal quotations and citations omitted) (alterations in original). *See also Lambrix v. Singletary*, 520 U.S. 518, 524 (1997) ("Constitutional issues are generally to be avoided"); *American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161 (1989) ("courts should be extremely careful not to issue unnecessary constitutional rulings"); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) (recognized the "settled federal practice" of avoiding consideration of unnecessary constitutional issues) (citing, *inter alia*, *Hayburn's Case*, 1 U.S. (1 Dall.) 408 (1792)).

[44] *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (1988) ("This principle required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims."); *Beazer*, 440 U.S. at 582 ("Before deciding the constitutional question, it [i]s incumbent on . . . courts to consider whether the statutory grounds might be dispositive.").

[45] *See Jean v. Nelson*, 472 U.S. 846, 857 (1985) (remanding for merits consideration on statutory rather than constitutional grounds) ("The fact that the protection results from the terms of a

In *Edward J. DeBartolo Corp. v. NLRB*,[46] the Supreme Court determined that, rather than address a possible statutory resolution, the agency resorted to constitutional interpretation to decide the conflict. The Court recognized the possible constitutional resolution, but, held that "[u]ntil the statutory question is decided, review of the constitutional issue is premature."[47] As a result, the Court vacated the opinion below and remanded for consideration of a statutory resolution.[48] Therefore, the Commission should avoid addressing the Commonwealth's constitutional sovereign immunity because the Commonwealth enjoys sovereign immunity by statute.

This position is not a new one in the context of the sovereign immunity of the Commonwealth. In *Maysonet-Robles v. Cabrero*, the Court of Appeals for the First Circuit followed the same approach.[49] When faced with an argument that *Alden* and *Seminole Tribe* should be read as undercutting the strength of First Circuit precedent granting sovereign immunity to the Commonwealth, the panel found no need to reach the constitutional element of the *Seminole Tribe* and *Alden* analysis. The *Maysonet-Robles* court, held that in accord with the two-step approach in *Seminole Tribe* and *Alden*, the court must first address whether Congress expressly intended to abrogate sovereign immunity before inquiring into the source of power: "Even on the assumption that Congress acts pursuant to a valid exercise of power, it must still 'unequivocally express its intent

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regulation or statute, rather than from a constitutional holding, is a necessary consequence of the obligation of all federal courts to avoid constitutional adjudication except where necessary.").

[46] 463 U.S. 147, 157 (1983).

[47] *Id.* at 158.

[48] *Id.*

[49] 323 F.3d 43, 53-54 (1st Cir. 2003).

to abrogate' a State's immunity."[50] Finding no evidence of intent to abrogate Puerto Rico's sovereign immunity, the court declined to address the subsequent constitutional issue.[51] In the same manner, the Commission should avoid an unnecessary constitutional matter.

V. PUERTO RICO IS ENTITLED TO THE SAME SOVEREIGN IMMUNITY AS THE STATES AS A MATTER OF STATUTE.

The Puerto Rico Federal Relations Act ("PRFRA") established that federal statutes have the same force and effect in Puerto Rico as in the fifty States.[52] The First Circuit and the District Court of the District of Columbia recognize that the PRFRA provision established a "default rule" that "[s]tatutes of general application would apply equally to Puerto Rico and to the fifty states *unless* Congress made specific provision for differential treatment."[53]

There is no dispute that State-run marine terminal operators are entitled to sovereign immunity from the Commission's adjudication of private Shipping Act complaints.[54] As the Supreme Court explained in *South Carolina Ports Authority*, States are protected from adjudication by the FMC of complaints filed by private parties.[55] The Court made clear that the "preeminent purpose" of sovereign

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[50] *Id.* at 54 (quoting *Seminole Tribe*, 517 U.S. at 55) (alteration in original).
[51] *See id.* ("We need not reach that constitutional question, however, because Plaintiffs' argument falls on its own weight. Whether or not Puerto Rico's long-held sovereign immunity is constitutional or common-law in nature, it has not been abrogated by Congress here.").
[52] 48 U.S.C. § 734 ("The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States . . . .").
[53] *Rodriguez v. Puerto Rico Federal Affairs Administration*, 338 F. Supp. 125, 128-129 (D.D.C. 2004) citing *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 42 (1st Cir. 2000).
[54] *Federal Maritime Comm'n v. South Carolina States Ports Auth.*, 535 U.S. 743 (2002).
[55] 535 U.S. 743, 760 (2002).

immunity is to "accord states the dignity that is consistent with their status as sovereign entities."[56]

Under the default rule, the FMC must treat the Commonwealth of Puerto Rico the same as a State in matters under the Shipping Act unless Congress made specific provision to abrogate sovereign immunity. Congress enacted no such abrogation. Accordingly, as a matter of statute, the Commonwealth of Puerto Rico is entitled to the same sovereign immunity enjoyed by States in privaletly-filed complaints before this Honorable Commission.

A. The "Default Rule" of Statutory Construction Establishes that Federal Statutes Apply Equally to Puerto Rico and the States.

Setting aside the issue of Puerto Rico's Constitutional sovereign immunity, the Commonwealth is entitled to immunity from suit in this instance as a matter of statute. As the First Circuit in *Jusino Mercado v. Commonwealth of Puerto Rico* held, and as the District Court for the District of Columbia in *Rodriguez v. Puerto Rico Federal Affairs Administration* recognized, there is a "default rule" of statutory construction that Puerto Rico's sovereign immunity from federal statutes is co-extensive with that of the fifty States, unless a statute specifically provides otherwise.[57] This default rule emanates both from a federal statute, the Puerto Rican Relations Act, and a Supreme Court decision interpreting that statute.

The PRFRA, requires, in relevant part, that federal statutes apply equally to States and to Puerto Rico. That statute reads:

> The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, *shall*

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[56] *Id.*
[57] *Rodriguez*, 338 F. Supp. at 128-129 *citing Jusino Mercado*, 214 F.3d at 42.

have the same force and effect in Puerto Rico as in the United States....[58]

The Supreme Court has confirmed that the PRFRA's purpose was to "accord to Puerto Rico the degree of *autonomy* and *independence* normally associated with the States of the Union."[59] Thus, the PRFRA, coupled with the Supreme Court's decision in *Examining Board,* created a "default rule" of statutory construction that Puerto Rico's sovereign immunity is co-extensive with that of the States,[60] and that "courts will not ordinarily construe statutes to treat Puerto Rico one way and the states another unless the language of the statute demands that result."[61]

B. Congress did Not Depart from the "Default Rule" with Respect to the Shipping Act.

Jusino Mercado held, and *Rodriguez* recognized, that the default rule of statutory construction could be overcome where there is either:

(i) an "express direction in the statutory text" to treat Puerto Rico differently than the states; or

(ii) "some other compelling reason."[62]

Thus, in order to determine whether the circumstances of the present case departs from the general rule that the Commonwealth of Puerto Rico is entitled to sovereign immunity, the adjudicative body has to examine the language of the law at stake and the existence of any other compelling reason. In the present case, there is no reason to depart from the general rule because neither the

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[58] 48 U.S.C. 734 (emphasis added).
[59] *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976)(emphasis added).
[60] *Jusino Mercado*, 214 F.3d at 42.
[61] *Jusino Mercado*, 214 F.3d at 42.
[62] *Jusino Mercado*, 214 F.3d at 42. *Rodriguez*, 338 F. Supp. at 128-129.

language of the Shipping Act nor the application of the *Rodriguez* analysis results in an abrogation of the default rule that Puerto Rico is entitled to the same sovereign immunity enjoyed by the States in this instance.

1. The Shipping Act Applies Equally to Puerto Rico and the States.

The Shipping Act is intended to apply equally to marine terminal operators in the States and Puerto Rico, and nothing in statutory text suggests an intent to treat Puerto Rico differently from the States.[63] To the contrary, several factors support the opposite conclusion. Section 4(b) of the Shipping Act authorizes the regulation of marine terminal operators generally, without any differentiation between the States and Puerto Rico.[64] The definition of a marine terminal operator, "a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier . . ." similarly does not distinguish between the States and Puerto Rico.[65] The only place where "Puerto Rico" is even mentioned in the Act is in the definition of "United States," which far from expressly indicating differential treatment, treats Puerto Rico the same as the States.[66] The express language of

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[63] 46 App. U.S.C. 1701 *et. seq.*
[64] 46 App. U.S.C. 1703.
[65] 46 App. U.S.C. 1702 (14).
[66] "United States" is defined as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions." 46 App. U.S.C. 1702 (25). The fact that the Shipping Act is "applicable" to states and Puerto Rico has no significance. The federal government can enforce the statute against sovereign entities. *See Federal Maritime Comm'n v. South Carolina States Ports Auth.*, 535 U.S. 743, 768 (2002) (FMC retains the means to investigate and enforce the Shipping Act against marine terminals otherwise immune from private Shipping Act suits). However, it does not alter the fact that a private citizen cannot maintain a suit for damages against the sovereign; such a claim is barred by sovereign immunity regardless of the fact that the statute may "apply." Accordingly, the fact that the Shipping Act is "applicable" to Puerto Rico is irrelevant.

the Shipping Act pertaining to Puerto Rico expresses the clear intent of Congress to treat Puerto Rico in the same manner as the States.

On the other hand, Congress has not amended the Shipping Act to provide separate private enforcement provisions for Puerto Rico. In fact, Congress could have treated Puerto Rico differently than the states, but chose not to.

When Congress passed the Shipping Act in 1984, the PRFRA had been in place for over twenty years. A decade before Congress passed the Shipping Act, the Supreme Court held that Congress intended the PRFRA to, "accord to Puerto Rico the degree of autonomy and independence normally associated with the States of the Union."[67] Congress is presumed to know of federal court interpretations of statutes it passes.[68] Thus, in 1984, if Congress intended to treat Puerto Rico differently from the States, Congress would have explicitly treated Puerto Rico differently at that time. It did not.

2. There are No "Other Compelling Reasons" to Treat Puerto Rico Differently from the States.

There are no compelling reasons under the Shipping Act to treat Puerto Rico differently from the States. As the *Jusino Mercado* Court noted, for the "rare" compelling-reason exception to apply, "there would have to be specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post-

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[67] *Examining Bd.*, 426 U.S. at 594.

[68] *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("[w]e generally presume that Congress is knowledgeable about existing law pertinent to the statutes it enacts").

Constitutional Puerto Rico than into the local affairs of a state."[69] No such reasons exist in the statute or elsewhere.

Indeed, the Commission has already suggested that its enforcement of the Shipping Act does not differentiate between Puerto Rico ports and State ports. In *Port of Ponce v. Puerto Rico Ports Authority*, the Commission held:

> "Our jurisdiction over terminal activities in Puerto Rico is not diminished by Puerto Rico's legal status. FMC consideration of Puerto Rican practices affecting terminal operations is no more an intrusion into Puerto Rico's sovereignty than the Commission's responsibilities concerning ports and port authorities on the mainland." [70]

Therein, the Commission acknowledged the coercive nature of its power and the intrusion on the sovereignty of both Puerto Rico-run and State-run ports, without according Puerto Rico any differing treatment.

C. The *Rodriguez* Analysis is Consistent with Finding that Puerto Rico is Entitled to Immunity from Private Causes of Action.

The Commission, in its Order of November 22, 2004 in this matter, cited to *Rodriguez* for the proposition that "[a]t least one federal district court outside of the First Circuit has found that Puerto Rico is not entitled to sovereign immunity."[71] Setting aside the merits of *Rodriguez's* erroneous conclusion that Puerto Rico is not entitled to *constitutional sovereign immunity*,[72] the decision

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[69] *Jusino Mercado*, 214 F.3d, at 43.
[70] *Port of Ponce v. Puerto Rico Ports Authority*, FMC Docket No. 88-5, 25 S.R.R.883 (April 25, 1990).
[71] *Odyssea Stevedoring v. Puerto Rico Ports Auth.*, Order, FMC Docket No. 02-08 at 5, (November 22, 2004).
[72] The order denying sovereign immunity to the Puerto Rico Federal Affairs Administration has recently been certified for interlocutory appeal under 28 U.S.C. § 1292(b). *See* Order, *Rodriguez v. Puerto Rico Federal Affairs Admin.*, Docket No. CIV.A.03-2246(JR) (Dec. 13, 2004).

plainly recognized that Puerto Rico is entitled to *statutory sovereign immunity*,[73] in circumstances such as those presented here.

In *Rodriguez,* a former employee of an executive agency of the Commonwealth sued the agency alleging violations of the Federal Labor Standards Act ("FLSA"). In 1974, Congress amended the FLSA to specifically permit a private cause of action for money damages against a public agency. The amendments defined "Public agency" to include federal or State governments, and in turn defined "State" in a manner including Puerto Rico.[74] Congress unmistakably expressed its intention to pierce the shield of immunity by creating a cause of action specifically against public agencies. However, the effort was ultimately thwarted on sovereign immunity grounds by *Seminole Tribe* and its progeny. The question in *Jusino Mercado* and *Rodriguez* was whether the same shield of immunity applied to Puerto Rico.[75]

Both *Jusino Mercado* and *Rodriguez* ultimately answered the question from a statutory, not a constitutional, perspective.[76] *Rodriguez* recognized the default rule enunciated by the First Circuit in *Jusino Mercado,* and in both cases the ultimate issue addressed was whether Congress, in the FLSA amendments, specifically, abrogated the default rule that Puerto Rico be accorded the same treatment as the States. [77] The *Jusino Mercado* and *Rodriguez* decisions differ

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[73] *Rodriguez,* 338 F. Supp. at 129-130 (restating with approval the default rule and *Jusino Mercado* analysis of that rule).
[74] 29 U.S.C. §§ 216(b); 203(x); 203(c) ("state" is defined to mean: any state of the United States or the District of Columbia or any Territory or possession of the United States).
[75] *See, e.g., Jusino Mercado*, 214 F.3d at 36.
[76] *Jusino Mercado*, 214 F.3d at 44 ("we ground our holding in statutory construction rather than constitutional capacity"); *Rodriguez,* 338 F. Supp. at 128-130 (recognizing the statutory default rule, but applying principles of statutory construction to infer that the rule had been abrogates).
[77] *Jusino Mercado*, 214 F.3d at 42; *Rodriguez,* 338 F. Supp. at 129-130.

not about the validity of the default rule, but whether the FLSA abrogated the default rule. This difference is irrelevant here because the Shipping Act analysis does not implicate the FLSA. Absent an unequivocal expression by Congress of an intent to abrogate sovereign immunity, the Commonwealth is entitled to the same treatment as the States, as a matter of statute.[78]

Both *Jusino Mercado* and *Rodriguez* agreed that Puerto Rico is statutorily entitled to sovereign immunity unless the statute at issue specifically abrogates that immunity. The particularities of the 1974 FLSA amendments, specifically Congress's specific intent to pierce public agency sovereign immunity, are simply not present in the Shipping Act. There is no express language or compelling reason to treat Puerto Rico differently in the Shipping Act. Therefore, applying the *Rodriguez* approach to the Shipping Act produces the same result as *Jusino Mercado*. The Commonwealth enjoys the same sovereign immunity from private Shipping Act claims afforded to the States.

d. First Circuit Precedent is Particularly Persuasive Authority on Issues of Puerto Rico´s Sovereign Immunity.

In addition to the fact that the reasoning behind *Jusino-Mercano* is sound, there is another reason why this Honorable Commission should not upset the law of the First Circuit recognizing Puerto Rico´s entitlement to sovereign immunity. As the only federal court which hears appeals from the Puerto Rico district court, the First Circuit has considered the issue and has developed well-established case law over the matter.

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[78] *Maysonet-Robles*, 323 F.3d at 54 (quoting *Seminole Tribe*, 517 U.S. at 55) (alteration in original).

To deny the recognition of the statutory sovereign immunity enjoyed by Puerto Rico, this Commission would have to abandon the logic and reasoning of the Court of Appeals that has decided issues of sovereign immunity unique to Puerto Rico since the 1940's.[79] Such a departure, given the First Circuit's unique posture, would be unwise, as it would upset the predictable and consistent development of legal principles applicable to Puerto Rico. For this additional reason, this Commission should follow the First Circuit and hold that the Commonwealth of Puerto Rico is entitled to sovereign immunity against privately-filed complaints in federal administrative proceedings.

VI. THE COMMONWEALTH POSSESSES CONSTITUTIONAL SOVEREIGN IMMUNITY.

The body politic known as the People of Puerto Rico is a Commonwealth—*El Estado Libre Asociado de Puerto Rico*—with complete autonomy in internal governance. Since 1913, the Supreme Court has recognized that Puerto Rico enjoys sovereign immunity from suits without its consent. Under the 1952 *compact*, sovereign immunity remains an inherent characteristic of the Commonwealth of Puerto Rico. In this relationship, the Commonwealth of Puerto Rico is not a State, but is not less than a State. Thus, the Commonwealth, like the States, does not have complete authority over all

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[79] *Fresenius Medical v. Puerto Rico Cardiovascular*, 322 F.3d 56, 61, (1st Cir. 2003), certiorari denied 124 S.Ct. 296, 540 U.S. 878, 157 L.Ed.2d 142; *Saldaña-Sánchez v. López-Gerena,* 256 F.3d 1 (1st Cir. 2001); *Acevedo López v. Police Dep't of Commonwealth of Puerto Rico*, 247 F.3d 26(1st Cir. 2001); *Arecibo Community Health Care v. Commonwealth of Puerto Rico*, 244 F.3d 241 (1st Cir. 2001); *U.S.I. Properties Corp. v. M.D. Construction Co.*, 230 F.3d 489 (1st Cir. 2000); *Jusino Mercado v. Puerto Rico*, 214 F.3d 34 (1st Cir. 2000); *Ortiz-Feliciano v. Toledo-Davila*, 175 F.3d 37 ((1st Cir. 1999); *De León López v. Corporación Insular de Seguros*, 931 F.2d 116 (1st Cir. 1991); *Fred v. Aponte Roque*, 916 F.2d 37 (1st Cir. 1990); *Echevarríia-González v. González-Chapel*, 849 F.2d 24 (1st Cir. 1988); *Reyes v. Supervisor of Drug Enforcement Administration*, 834 F.2d 1093 (1st Cir. 1987).

matters, but, also like the States, the Commonwealth retains its inviolate sovereign immunity from suit without its consent.

A. Puerto Rico Retained Sovereign Immunity as Part of the *Compact* Between the United States and the Commonwealth of Puerto Rico.

1. Alden v. Maine*, Dignity, and the FMC Order.*

The Commission poses the question:

> Whether Puerto Rico should be treated as a state for the purposes of constitutional sovereign immunity from federal administrative proceedings in light of the origin and purposes of such immunity as explained by the Supreme Court in *Alden v. Maine*, *Federal Maritime Commission v. S.C. State Ports Auth.*, and other relevant opinions.[80]

The Commission also stated its view that the *Alden* court "emphasized that the immunity of states from coercive process arises by constitutional design, not as a mere continuation of the states' common law immunity from suit."[81] Further, the Commission indicated that the issue arising from the *Alden* line of cases was "whether Puerto Rico holds the same constitutional dignity interests held by the states, and whether an administrative proceeding would violate that dignity."[82] Finally, the Commission stated: "We believe that it is difficult at first glance to reconcile the First Circuit's doctrine regarding Puerto Rico's sovereign immunity with the Supreme Court's view that sovereign immunity is a particular feature of the constitutional design and the relationship between the federal government and the states."[83]

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[80] FMC Order, Nov. 22, 2004, at 6.
[81] *Id.* at 4.
[82] *Id.*
[83] *Id.* at 5.

At the outset, *Alden* and *Seminole Tribe of Florida v. Florida*[84] do not stand for the proposition that only States are entitled to constitutional sovereign immunity. That issue was not presented to the Supreme Court. Nor did *Alden* and *Seminole Tribe* change the requirement that if Congress abrogates a State's sovereign immunity it must do so clearly.[85] The Supreme Court merely added a second inquiry to the sovereign immunity analysis—"whether Congress acted pursuant to a valid exercise of power."[86]

The context of *Alden* and *Seminole Tribe*, i.e. States being sued in Federal and State courts respectively, naturally led to the discussion of sovereign immunity as it pertains to the States, but that should not be read to limit the application of sovereign immunity to the Commonwealth. To the extent that the Supreme Court did define exactly how a body politic maintains sovereign immunity within the system of dual-governments, the focus should be, as it was in *Alden* and *Seminole Tribe*, **on the retention of sovereign immunity.**

In *Alden v. Maine*, the Supreme Court described the process by which a State entered into the Union, giving up certain aspects of its authority, but "retain[ing] 'a residuary and inviolable sovereignty.'"[87] It was the retention of sovereign immunity as a condition to entering into the Union that proved paramount to the *Alden* court. *Alden* looked to the "constitutional design" as evidence of the bargain struck among the original States and, later, the States

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[84] 517 U.S. 44 (1996).
[85] *See Alden*, 527 U.S. at 737 (before *Seminole Tribe*, it was understood that Congress could abrogate sovereign immunity "so long as Congress made its intent sufficiently clear").
[86] *See Maysonet-Robles v. Cabrero*, 323 F.3d 43, 54 n.9 (1st Cir. 2003) (discussing *Seminole Tribe* and *Alden*).
[87] 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39 (James Madison)).

and the Federal government. *Alden* neither diminishes the focus on the retention of the States' common law sovereign immunity within the terms of the bargain; nor establishes that the Constitution is the only possible bargain. **It is not the merger into the Union that confers sovereign immunity onto the body politic, it is the sovereign immunity that survives that merger.**

As *Alden* made clear, the Eleventh Amendment did not confer onto the States immunity from suit; rather, it reaffirmed that the understanding of sovereign immunity, as it existed at the time of the drafting of the United States Constitution, applies today.[88] In fact, the Court stated that "the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit."[89] Then and now, sovereign immunity springs from the dignity of the body politic because the very source of the immunity is that dignity.[90]

The Supreme Court's focus on dignity accords with the First Circuit authority because the origin of the First Circuit authority on the Commonwealth (which was later adopted by the Supreme Court) focused exclusively on whether the Commonwealth was entitled to the same dignity as the States.[91] Conclusively, with respect to sovereign immunity, the First Circuit held that the People of Puerto Rico, as a result of their unique Commonwealth status, are entitled to the same dignity as the States. The Supreme Court has relied on that analysis and reached the same conclusion about the dignity due to the

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[88] 527 U.S. at 722 ("The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design.").
[89] *Id.* At 736.
[90] *See Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002).
[91] *See Calero-Toledo*, 416 U.S. at 672-73 (quoting *Mora*, 206 F.2d at 387-88).

Commonwealth of Puerto Rico.[92] There is no difficulty in reconciling the First Circuit's decisions regarding the Commonwealth's sovereign immunity with recent Supreme Court decisions concerning sovereign immunity.[93]

For the *Alden* court, the two key elements of present-day constitutional sovereign immunity are (1) a pre-existing sovereign immunity and (2) an agreement or *compact* merger into the United States which does not extinguish that sovereign immunity. Here, *Alden*, asks whether, by entering into the *compact* with the United States, the Commonwealth of Puerto Rico "retain[ed] the dignity, though not the full authority, of sovereignty."[94] Like a State, the answer for the Commonwealth must be in the affirmative.

Further, the Commission already has its answer to the question of Puerto Rico's status. The Executive branch of the Federal government has long been under clear instructions to treat the Commonwealth of Puerto Rico as if it were a State.[95] In *Federal Maritime Commission v. South Carolina State Ports Authority*, the Commission represented itself as an "executive branch administrative

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[92] *See* Part VI.A.4, *infra* (discussing the Supreme Court's treatment of post-*compact* Puerto Rico and adoption of First Circuit precedent).

[93] Since *Alden* was decided, the First Circuit has continued to hold that the Commonwealth of Puerto Rico continues to enjoy sovereign immunity protection from suit in Federal courts, whether by "constitutional design" or by statute. *See Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 21 n.3 (1st Cir. 2001) ("the Commonwealth of Puerto Rico is protected by the Eleventh Amendment to the same extent as any state") (internal quotations omitted). *See also Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 39 (1st Cir. 2000) ("Since [the *compact*] we consistently have held that Puerto Rico's sovereign immunity in federal courts parallels the states' Eleventh Amendment immunity.") (ultimately relying on statutory sovereign immunity); *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 54 (1st Cir. 2003) ("We need not reach that constitutional question, however, because Plaintiffs' argument falls of its own weight. Whether or not Puerto Rico's long-held sovereign immunity is constitutional or common-law in nature, it has not been abrogated by Congress here.").

[94] 527 U.S. at 715.

[95] *See* Part VI.A.3, *infra* (discussing executive memoranda and statements pertaining to Puerto Rico).

agenc[y]" comprised of "executive officers."[96] Accordingly, the FMC must conclude that the Commonwealth of Puerto Rico is entitled to sovereign immunity in the same manner as a State.

2. *Puerto Rico was a Sovereign* Before *Entering into the* Compact.

From the start, the United States Supreme Court has consistently held that Puerto Rico is entitled to sovereign immunity.[97] In *Rosaly y Castillo*, the Court determined that the government of the People of Puerto Rico was immune from suit under the doctrine of sovereign immunity:

> It is not open to controversy that, aside from the existence of some exception, the government which the organic act [i.e. the Foraker Act] established in P[ue]rto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent.[98]

According to the *Rosaly y Castillo* Court, the conclusion that Puerto Rico enjoyed "immunity from suit without its consent is necessarily inferable from the nature of the Porto Rican government."[99] The Court's rationale was founded on the recognition that "[t]he purpose of the [Foraker Act] was to give local self-government conferring an autonomy similar to that of the states."[100]

Moreover, the Supreme Court has consistently applied the *Rosaly y Castillo* holding ever since it was announced. In the years following *Rosaly y Castillo*, the Court refined its holding, but did not question the existence of Puerto

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[96] 535 U.S. 743, 750, 754 (2002) (quoting the ALJ's order and FMC Brief).
[97] *People of Puerto Rico v. Rosaly y Castillo*, 227 U.S. 270, 273 (1913).
[98] *Id.*
[99] *Id.* at 274.
[100] *Id.* (internal quotation omitted).

Rico's sovereign immunity.[101] Later in *People of Puerto Rico v. Shell Co. (P.R.), Ltd.*, the Supreme Court stated:

> The aim of the Foraker Act and the Organic Act [i.e. Jones Act] was to give Puerto Rico full power of local self-determination with an autonomy similar to that of the states and incorporated territories. The effect was to confer upon the territory many of the attributes of quasi sovereignty possessed by the states--as, for example, immunity from suit without their consent.[102]

By the time the Court heard *Sancho v. Yabucoa Sugar Co.*, any doubt as to Puerto Rico's sovereign immunity was foreclosed.[103] Supreme Court succinctly stated that "this suit cannot be maintained unless authorized by Porto Rican law, because Porto Rico cannot be sued without its consent."[104]

The *Rosaly y Castillo* Court noted that, in the Foraker Act, Congress had recognized the People of Puerto Rico as a body politic and that the People's governmental powers specifically included sovereign immunity.[105] The Supreme Court discussed Puerto Rico's governmental power as "a recognition of a liability to be sued consistently with the nature and character of the government; that is, *only in case of consent duly given.*"[106] That the sovereign immunity of People of Puerto Rico was elemental should not be overlooked. Nor should the fact that it derived from the nature of the people of Puerto Rico as a body politic. The existence of a body politic and the sovereign immunity spring from the same provenance—indeed, the two concepts define each other. As the Supreme Court held in *Rosaly y Castillo*, the existence of sovereign immunity is a

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[101] *See People of Porto Rico v. Bonocio Ramos*, 232 U.S. 627, 631-32 (1914); *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916).
[102] 302 U.S. 253, 261-62 (1937) (citing, *inter alia*, *Rosaly y Castillo*, 227 U.S. at 274).
[103] 306 U.S. 505, 506 (1939).
[104] *Id.* (citing *Rosaly y Castillo*, 227 U.S. at 274 and *Puerto Rico v. Shell Co.*, 302 U.S. at 262).
[105] *See Rosaly y Castillo*, 227 U.S. at 275 (interpreting section 7 of Foraker Act).
[106] *Id.* at 277 (emphasis added).

necessary inference from the existence of a body politic that enjoys governmental powers.[107] The progression of subsequent Supreme Court holdings show the continuing strength of the *Rosaly y Castillo* position.

Unquestionably, the historical basis of the inherent sovereignty of Puerto Rico deserves special mention. In fact, before entering into the *compact*, Puerto Rico enjoyed a degree of sovereignty that was even greater than the one enjoyed by most of the States before becoming part of the Union.[108]

There is no doubt that, even before entering into the *compact* with the United States, the government of Puerto Rico was understood to enjoy protection against both an invasion into its treasury and on its dignity under the doctrine of sovereign immunity.[109] According to the Supreme Court of Puerto Rico, the doctrine of sovereign immunity remains an integral part of the Commonwealth Constitution.[110] The *compact* served further to enshrine the inherent governmental characteristic of sovereign immunity in the relationship between the People of Puerto Rico and the United States.

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[107] *Id.* at 274.

[108] *See United States v. Lara*, 124 S.Ct. at 1639(Stevens, J., concurring)("In contrast, most of the States were never actually independent sovereigns, and those that were enjoyed that independent status for only a few years.").

[109] *See Rosaly y Castillo* at 277. *See also Sancho v. Yabucoa Sugar Co.*, 306 U.S. 505, 506 (1939) ("this suit cannot be maintained unless authorized by Porto Rican law, because Porto Rico cannot be sued without its consent"); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 262 (1937) (noting that the Foraker Act conferred, *inter alia*, "immunity from suit without their consent.").

[110] *See Defendi Collazo v. Commonwealth of Puerto Rico*, 134 D.P.R. 28 (PR 1993) (Naveira De Rodon, J.) (Sovereign immunity is part of the constitutional structure) (Rebollo Lopez, J., concurring) (Tracing the origins of the sovereign immunity doctrine in the Commonwealth Constitution to the *compact* between the United States and Puerto Rico).

3. *The Commonwealth of Puerto Rico—Not a State, but Not Less than a State.*

The Federal judiciary has repeatedly recognized that Puerto Rico attained its Commonwealth status pursuant to a binding *compact* with the United States. Indeed, by its own terms, Public Law 600 confirms that, in keeping with "the principle of government by consent, this Act is now adopted in the nature of a *compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adopting."[111]

The legislative history of Public Law 600 shows that Congress intended the status of Commonwealth sovereignty to be on par with the States, although the Commonwealth was not a State. Testifying before the Senate Committee on Insular Affairs, Governor Muñoz-Marín explained: "Nothing short of self-government can be by its own nature, and by the dignity of human freedom a subject for a solemn agreement. We are establishing a status that is not federated statehood, but is not less than federated statehood."[112]

When President Truman accepted the Commonwealth Constitution and transferred it to Congress, he noted that the *compact* and associated legislation "was the last in a series of enactments through which the United States has provided ever-increasing self-government in Puerto Rico."[113] President Truman concluded his discussion of the *compact* and its import:

> With its [i.e. the Commonwealth Constitution] approval, full authority and responsibility for local self-government will be vested in the

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[111] Act of July 3, 1950, c. 446, § 1. 64 Stat. 319 (1950).
[112] Hearings before the Senate Comm. on Interior and Insular Affairs on S.J. Res. 151, 82nd Cong., 2nd Sess. 13 (Apr. 29, May 6, 1952).
[113] Executive Memorandum to the United States Congress, Harry S. Truman, April 22, 1952, *reprinted in* 1952 U.S.C.C.A.N. 1899, 1901 (1952).

people of Puerto Rico. The Commonwealth of Puerto Rico will be a government which is truly by the consent of the governed. *No government can be invested with higher dignity* and greater worth than one based upon the principle of consent.

The people of the United States and the people of Puerto Rico are entering into a new relationship that will serve as an inspiration to all who love freedom and hate tyranny.[114]

Subsequent Presidents have amplified President Truman's position. In 1961, President John F. Kennedy discussed the relationship between the United States and the Commonwealth of Puerto Rico:

> The Commonwealth structure, and its relationship to the United States which is in the nature of a compact, provide for self-government in respect of internal affairs and administration subject only to applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act, and the acts of Congress authorizing and approving the constitution.
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> All departments, agencies, and officials of the executive branch of the Government should faithfully observe and respect this arrangement in relation to all matters affecting the Commonwealth of Puerto Rico. If any matters arise involving the fundamentals of this arrangement, they should be referred to the Office of the President.[115]

Most recently, President George H.W. Bush addressed the Commonwealth's status:

> The Commonwealth structure provides for self-government in respect of internal affairs and administration, subject to relevant portions of the Constitution and the laws of the United States.
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> Because *Puerto Rico's degree of constitutional self-government, population, and size set it apart from other areas also subject to Federal jurisdiction under Article IV, section 3, clause 2 of the Constitution*, I hereby direct all Federal departments, agencies, and

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[114] *Id.* at 1902 (emphasis added).

[115] Executive Memorandum of July 25, 1961, John F. Kennedy, 26 Fed. Reg. 6695.

> officials, to the extent consistent with the Constitution and the laws of the United States, henceforward to treat Puerto Rico administratively as if it were a State . . . .[116]

For over fifty years, America's Presidents have repeatedly reaffirmed that the Commonwealth of Puerto Rico is not less than a State.

Congress has also structured the federal judiciary to treat the Commonwealth as if it were a State. In 1961, Congress amended title 28 of the United States Code to provide for "review [of] final judgments or decrees of the Supreme Court of Puerto Rico on certiorari or appeal in the same manner as judgments from the highest courts of the several States of the Union are now reviewed by th[e] [United States Supreme] Court."[117] In Congress' view, the similarity of treatment between the Commonwealth and the States was "appropriate in view of the change of the status of Puerto Rico [...] an associated Commonwealth under the Act of Compact."[118]

Later, in 1966 Congress amended title 28 again.[119] This time, Congress made federal judges in Puerto Rico enjoy life tenure, unlike the federal judges in the territories of the United States.[120] Congress identified that the relationship between the Commonwealth government and the Federal government is on par with that of the Federal government and the States:

> The U.S. district court in Puerto Rico is in its jurisdiction, powers, and responsibilities the same as the U.S. district courts in the several States. It exercises only Federal jurisdiction, the local

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[116] Executive Memorandum on the Commonwealth of Puerto Rico, George H.W. Bush, November 30, 1992, 57 Fed. Reg. 57093.
[117] S. Rep. No. 87-735, *reprinted in* 1961 U.S.C.C.A.N. 2448, 2449 (discussing Pub. L. No. 87-189 (1961) (amending 28 U.S.C. 1257)).
[118] *Id.*
[119] Pub. L. No. 89-571 (1966).
[120] *See* S. Rep. 89-1504, *reprinted in* 1966 U.S.C.C.A.N. 2786, 2786-87.

> jurisdiction being exercised by a system of local courts headed by a Supreme Court of the Commonwealth of Puerto Rico.
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> Finally, the Commonwealth of Puerto Rico is a free state associated with and subject to the Constitution and laws of the United States, but not a State of the Union. It has virtually complete local autonomy and it seems proper, therefore, to accord it the same treatment as a State by conferring upon the Federal district court there the same dignity and authority enjoyed by the other Federal district courts.[121]

From the Foraker Act to *Rosaly y Castillo* and to the present Commonwealth status, Puerto Rico has retained an inviolable sovereignty similar to that of the States.

Puerto Rico has "become a State within a common and accepted meaning of the word."[122] It is undeniable that the Commonwealth of Puerto Rico, as a result of the *compact*, "is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact."[123] Having accepted Congress' offer of a *compact*, the Commonwealth of Puerto Rico must be afforded the dignity due to it as a Commonwealth—*not less than a State.*

4. Subsequent Treatment—As a State for the Purposes of Sovereign Immunity.

The Supreme Court has also spoken with clarity about the sovereignty of Puerto Rico: "Puerto Rico, like a state, is an autonomous political entity,

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[121] *Id.* at 2787-88.
[122] *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953).
[123] *Id.*

'sovereign over matters not ruled by the Constitution.'"[124] This description of Puerto Rico's sovereignty is nothing less than that of any State in the Union. It is derived from the same Supreme Court and First Circuit precedent that the Commission questioned, but the rational not only survives the *Alden* analysis, it is strengthened by it.

In *Calero-Toledo v. Pearson Yacht Leasing*, the United States Supreme Court first had the opportunity to address the effect of the Commonwealth of Puerto Rico's new status.[125] The decision involved the review of a three-judge panel's opinion,[126] but before addressing the merits, the Court first discussed whether the three-judge panel had jurisdiction to hear the case at the outset.[127]

According to the Court, three-judge panels were reserved for the review of *State* laws only and this State-law requirement had been interpreted narrowly in the past.[128] The three-judge panels were utilized to minimize the intrusion on the dignity of the States when Federal courts reviewed the constitutionality of State laws. The *Calero-Toledo* Court pointed out that, according to Supreme Court precedent, the laws of territories merited no such respect and were not reviewed by the three-judge panel. The reason for the distinction between the laws of territories and States was because:

> the predominant reason for the enactment of [the Three-Judge Court Act] does not exist [in] respects [to] territories. This reason was a congressional purpose to avoid unnecessary interference with the laws of a sovereign state. *In our dual system of*

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[124] *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 673 (1974)).
[125] 416 U.S. 663, 671 (1974).
[126] The three-judge panel was convened under 28 U.S.C. § 1281 (repealed) to review the constitutionality of a Commonwealth law. *See id.* at 669.
[127] *See id.* at 670-71.
[128] *See id.* at 670.

> *government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory.* A territory is subject to congressional regulation.[129]

Accordingly, only if the "statutes of Puerto Rico are 'State statute(s)' for the purposes of the Three-Judge Court Act" could the Supreme Court entertain the appeal.[130] To answer the question of whether the Commonwealth of Puerto Rico should be afforded the same respect as the States, the Court looked to the *compact* and its effect on the status of Puerto Rico.[131] After a brief review of the history of Puerto Rico, and a discussion of the maturation of self-rule in the Commonwealth, the Supreme Court looked to the First Circuit's expertise in the treatment of Puerto Rico. The Court relied on the seminal case on post-*compact* Puerto Rico and quoted the analysis at length:

> These significant changes in Puerto Rico's governmental structure formed the backdrop to Judge Magruder's observations in *Mora v. Mejias*:[132]
>
> > [I]t may be that the Commonwealth of Puerto Rico—'El Estado Libre Asociado de Puerto Rico' in the Spanish version—organized as a body politic by the people of Puerto Rico under their own constitution, pursuant to the terms of the compact offered to them in [Public Law 600], and by them accepted, is a State within the meaning of [the three-judge panel]. The preamble to this constitution refers to the Commonwealth . . . which "in the exercise of our natural rights, we [the people of Puerto Rico] now create within our union with the United States of America." Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would

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[129] *Id.* at 670-71 (quoting *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 377-78 (1949) (holding that the laws of the Territory of Hawaii were not entitled to review by a three-judge panel)) (emphasis added).
[130] *Id.*
[131] *See id.* at 671-73 (reviewing the development and history of the Commonwealth of Puerto Rico and the terms and effect of the *compact*).
[132] 206 F.2d 377, 387-88 (1st Cir. 1953).

> seem to have become a State within a common and accepted meaning of the word . . . . It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact.
>
> A serious argument could therefore be made that the Commonwealth of Puerto Rico is a State within the intendment and policy of [the three-judge panel] . . . . If the constitution of the Commonwealth of Puerto Rico is really a "constitution"—as the Congress says it is—and not just another Organic Act approved and enacted by the Congress, then the question is whether the Commonwealth of Puerto Rico is to be deemed "sovereign over matters not ruled by the Constitution" of the United States and thus a "State" within the policy of [the three-judge panel], which enactment, in prescribing a three-judge federal district court, expresses "a deference to state legislative action beyond that required for the laws of a territory" whose local affairs are subject to congressional regulation.

> Lower federal courts since 1953 have adopted this analysis and concluded that Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution' and thus a State within the policy of the Three-Judge Court Act.[133]

In *Calero-Toledo*, the Supreme Court specifically considered whether the Commonwealth of Puerto Rico should enjoy the deference due to a State under the dual system of government and determined that because of the *compact* and the Commonwealth Constitution, "Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution.'"[134] Further, the Court clarified its position and stated that its holding was not an expansion of the narrow requirement under

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[133] *Calero-Toledo*, 416 U.S. at 672-73 (quoting *Mora*, 206 F.2d at 387-88) (internal citations omitted).

[134] *Id.* at 673 (quoting *Mora*, 206 F.2d at 387-88).

the Three-Judge Court Act, but, rather an approval of the treatment of Puerto Rico as a Commonwealth.[135]

The key component of the *Calero-Toledo* analysis, the determination of the effect of the *compact* and Commonwealth constitution, has also been relied on in subsequent Supreme Court opinions. In *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, Supreme Court followed the *Calero-Toledo* approach by basing its conclusion on a thorough analysis of the history of the relationship between Puerto Rico and the United States.[136] In view of the history, the Court "readily concede[d] that Puerto Rico occupies a relationship to the United States that has no parallel in our history."[137] However, the historical analysis led the Court to the conclusion that when the Commonwealth constitutional convention approved the final version of the Commonwealth Constitution, "the compact became effective, and Puerto Rico assumed 'Commonwealth' status."[138] Ultimately, the Court made clear in *Examining Board* what it had described in *Calero-Toledo*: "[T]he purpose of Congress in the 1950 and 1952 legislation [i.e. the *compact*] was to *accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union.* " In support of the proposition that the Commonwealth of Puerto Rico enjoys the

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[135] *Id.* at 675 ("While still of the view that [section] 2281 is not a measure of broad social policy to be construed with great liberality, we believe that the established federal judicial practice of treating enactments of the Commonwealth of Puerto Rico as 'State statute(s)' for purposes of the Three-Judge Court Act, serves, and does not expand, the purposes of [section] 2281.") (internal quote and citation omitted).

[136] 426 U.S. 572, 586-94 (1975) (discussing the history of the relationship between Puerto Rico and the United States).

[137] *Id.* at 596.

[138] *Id.* at 593-94.

same autonomy and independence of a State, the Court relied on the form and structure of the Commonwealth government and the extent of popular control.[139]

More recently the Court has grounded its rationale for treating the Commonwealth in the same manner as the States on the joint holdings of *Calero-Toledo* and *Examining Board.* In *Rodríguez v. Popular Democratic Party,* the Court relied on *Colero-Toledo* and *Examining Board* in determining that Puerto Rico was entitled to the same latitude in elections as the States enjoy.[140] Similarly, the Court, in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* has applied the same rules that normally apply to the States regarding constitutional challenges of statutes to Puerto Rico specifically because of its Commonwealth status.[141]

Furthermore, the Court, in *People of Porto Rico v. Ramos*[142] and *Richardson Fajardo Sugar Co.*[143] has applied to Puerto Rico the same rules that normally apply to the States in cases presenting controversies regarding sovereign immunity. Thus, it is a well-established law that, in light of the unique and particular relationship under the *compact* between the Commonwealth of

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[139] *See id.* ("Puerto Rico now elects its Governor and legislature; appoints its judges, all cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal code.") (internal quotations omitted).
[140] *Rodriguez v. Popular Democratic Party,* 457 U.S. at 8 (quoting *Calero-Toledo,* 416 U.S. at 673).
[141] *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 339 (1986) ("we believe that Puerto Rico's status as a Commonwealth dictates application of the same rule") (citing *Calero-Toledo,* 416 U.S. at 672-73).
[142] 34 S.Ct. 461, 232 U.S. 627, 58 L.Ed. 215 (1914).
[143] 36 S.Ct. 476, 241 U.S. 44, 60 L.Ed. 879 (1916).

Puerto Rico and the United States, the Commonwealth enjoys the same sovereign immunity as the States.[144]

The analysis adopted in *Calero-Toledo* stems from the reasoning in *Mora* and has developed into the body of law in the First Circuit authority that specifically holds Puerto Rico enjoys the same sovereign immunity as the States because of its status as a Commonwealth.[145] The Commission asked how the First Circuit authority could survive *Alden*.[146] Indeed, the two authorities do more than survive each other; they support one another. *Alden* identified as the *sine qua non* of sovereign immunity the dignity afforded the States under the dual system of government and their preexisting sovereign immunity. *Calero-Toledo* does the same for the Commonwealth of Puerto Rico.

Almost as important as the actual holding in *Calero-Toledo* is the manner in which the Court reached its conclusion. The Supreme Court looked to the

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[144] *See* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment,* n. 154 (2003)("Several indications, however, show that the cases provide the rule that would have applied to state defendants in the same period. Most importantly, the Court's opinions in the two cases make no reference to the territorial status of Puerto Rico. The opinions appear to treat the cases as involving general rules of sovereign immunity that would apply equally to the case of a state defendant. Moreover, a year before *Ramos*, the Court had expressly stated that Puerto Rico "is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent." *Porto Rico v. Rosaly*, 227 U.S. 270, 273 (1913). This statement suggests that the rules for suits against Puerto Rico would be the same as those for cases against state sovereigns. The Court cited this case in *Richardson*, 241 U.S. at 47, so it had not forgotten about it. Similarly, Puerto Rico is today treated as a state for Eleventh Amendment purposes. See *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141-42 n.1 (1993) (assuming this point arguendo); *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) (holding that the Eleventh Amendment applies to Puerto Rico in all aspects). Finally, in *Richardson*, the Court relied upon Gunter, a case involving a state defendant. 241 U.S. at 47; see supra notes 148-53 and accompanying text. The fair inference from all these indications is that the holdings of *Richardson* and *Ramos* would apply to state defendants").

[145] The First Circuit has clearly and unequivocally held that the Commonwealth of Puerto Rico is entitled to protection from suit under the doctrine of sovereign immunity to the same extent as the States in an unbroken and consistent line of cases. *See Jusino Mercado*, 214 F.3d at 39 (citing a "phalanx of cases" in support of the Commonwealth's sovereign immunity). Even since *Alden*, the First Circuit has remained committed to its reasoning *See, supra* n.93.

[146] FMC Order.

compact and the Commonwealth Constitution and found the attributes of sovereignty that merited the same respect due to the States as members of the dual system of government. The Commonwealth is worthy of no less from the Commission. Based on the evaluation degree of autonomy and sovereignty enjoyed by Puerto Rico before 1952, and the enshrining of such attributes through the compact and the Commonwealth Constitution, the Commission should conclude that Puerto Rico is entitled to sovereign immunity to the same extent as the States.

6. The unique relationship under the compact allows the recognition of constitutional sovereign immunity to the Commonwealth of Puerto Rico.

Finally, it is worth to note that the unique relationship established under the *compact* allows the recognition of sovereign immunity to the Commonwealth of Puerto Rico under the Eleventh Amendment.

History suggests a great diversity of relationships between a central government and dependent territory. One of the great demands upon inventive Statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily, the United States Constitution has left this field of invention open.

Recently, in *United States v. Lara,* [147] the Supreme Court recognized and praised the authority of Congress to enter into political agreements with dependent entities other than states that conform to the unique demands of the particular relationship. In fact, in *Lara*, the Court emphasized that in entering into the *compact* with the Commonwealth, the United States, throughout the

[147] *United States v. Lara*, 124 S.Ct. 1628, 541 U.S. 193, 158 L.Ed.2d 420 (2004).

Congress, consented to a political relationship more unique than the one governing the relationship with other dependencies, as for example the Indian tribes:

> Congress' statutory goal--to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State--is not an unusual legislative objective. The political branches, drawing upon analogous constitutional authority, have made adjustments to the autonomous status of other such dependent entities--sometimes making far more radical adjustments than those at issue here. See, ...Puerto Rico--Act of July 3, 1950, 64 Stat. 319 ("[T]his Act is now adopted in the nature of a compact so that people of Puerto Rico may organize a government pursuant to a constitution of their own adoption"); P.R. Const., Art. I, § 1 ("Estado Libre Asociado de Puerto Rico).[148]

There is no dispute that the *compact* between Puerto Rico and the United States government has "no parallel in history." It is an unique relationship highly distinguishable, even from those covenants governing United States relationships with other possessions and/or territories.[149] In fact, the body of law governing the relationship between Puerto Rico and The United States is substantively and significantly different from the covenants governing the

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[148] *Id.* at 1635.

[149] *Misch on Behalf of Estate of Misch v. Zee Enterprises*, 879 F.2d 628 (9th Cir.1989) (holding that the Jones Act is applicable to the Commonwealth of Northern Mariana Islands and finding that the Organic Act governing Puerto Rico is substantively and significantly different from the Covenant governing United States--Commonwealth of Northern Mariana Islands relations.)

relationship of United States with Guam[150], Northern Mariana Islands[151], and the Virgin Islands.[152]

When Law 600 and the Constitution of Puerto Rico were approved, the Courts considered Puerto Rico enjoyed constitutional sovereign immunity.[153] That judicial construction was incorporated impliedly into the terms of the compact. Congress had the opportunity to exclude the Eleventh Amendment from the constitutional provisions applicable to the Commonwealth. It did not.

In fact, the procedure for the adoption of the compact (which was still more solemn in this case than in the case of compacts between states, inasmuch as Law 600 spells out a compact through the consent, not merely of a political organ of one of the contracting powers, but an entire people directly, by the human beings which constitute the community of Puerto Rico) and the well-established law recognizing that Puerto Rico enjoys the autonomy and independence normally associated with States of the Union, favors the parallel applicability of the constitutional sovereign immunity to the Commonwealth of Puerto Rico.

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[150] *Sakamoto v. Duty Free Shoppers*, 764 F.2d 1285 (9th Cir. 1985)(Denying Guam's claims of sovereign immunity because it has little power of self government).

[151] *Fleming v. Dept. of Public Safety*, 837 F.2d 401 (9th Cir. 1988)(Held that the Eleventh Amendment does not apply to the Commonwealth of Northern Mariana Island because the Eleventh Amendment is conspicuously absent from the covenant establishing its political relationship with the United States, even when the covenant expressly enumerates those provisions of the United States Constitution that will be applicable within the Northern Mariana Islands.

[152] *Tonder v. M/V The Burkholder*, 630 F. Supp. 691 (D.Virgin Islands 1986)(Held that the Eleventh Amendment does not apply to the Virgin Islands because the provision is not included in the list of constitutional provisions applicable to the Virgin Islands).

[153] *Rosaly y Castillo, supra.*

VII. CONCLUSION

For the foregoing reasons, the Commonwealth of Puerto Rico asks that the Commission declare that the Commonwealth enjoys sovereign immunity to the same extent as the States. Therefore, the Commission is barred from exercising its jurisdiction to adjudicate any privately-filed complaint alleging violations of the Shipping Act against the Commonwealth of Puerto Rico or its instrumentalities.

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Dated: January 5, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January 2005, a copy of the foregoing **COMMONWEALTH OF PUERTO RICO'S BRIEF ONITS ENTITLEMENT TO SOVEREIGN IMMUNITY FROM THE ADJUDICATION OF PRIVATELY-FILED COMPLAINTS ALLEGING VIOLATIONS OF THE SHIPPING ACT** was served by first class mail on the following persons:

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